1992

Dale H. Morgan v. BARBARA A. MORGAN, EVA S. BARNEY and VALLEY BANK & TRUST COMPANY, a Utah corporation; each of the above-named defendants personally, if living, the unknown spouse, heirs, devisees, assignees, personal representatives, and all creditors of each of the deceased defendants; also all other persons unknown claiming any right, title, estate, interest or lien upon the real property described in Complaint adverse to plaintiff's ownership or clouding plaintiff's title thereto : Brief of Appellee

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Gordon A. Madsen; Robert C. Cummings; Attorneys for Defendants/Appellants.
Mary C. Corporon; Corporon & Williams; Attorneys for Plaintiff/Appellee.

DOCKET NO. 920846

IN THE UTAH COURT OF APPEALS

DALE H. MORGAN,

Plaintiff/Appellee,

-vs-

BARBARA A. MORGAN, EVA S. BARNEY and VALLEY BANK & TRUST COMPANY, a Utah corporation; each of the above-named defendants personally, if living, the unknown spouse, heirs, devisees, assignees, personal representatives, and all creditors of each of the deceased defendants; also all other persons unknown claiming any right, title, estate, interest or lien upon the real property described in Complaint adverse to plaintiff's ownership or clouding plaintiff's title thereto,

Defendants/Appellants.

Case No. 920846

Priority No. ~~15~~ 15

BRIEF OF APPELLEE

APPEAL FROM THE SUMMARY JUDGMENT AND ORDER
OF THE THIRD JUDICIAL COURT OF SALT LAKE COUNTY
THE HONORABLE RICHARD H. MOFFAT, JUDGE PRESIDING

MARY C. CORPORON, #734
CORPORON & WILLIAMS
Attorneys for Plaintiff/Appellee
310 South Main, Suite 1400
Salt Lake City, Utah 84101
Telephone: (801) 328-1162

GORDON A. MADSEN, #2048
ROBERT C. CUMMINGS, #777
Attorneys for Defendants/Appellants
225 South 200 East, #150
Salt Lake City, Utah 84111
Telephone: (801) 322-1141

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Plaintiff/Appellee,

-vs-

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Priority No. 16

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Attorneys for Plaintiff/Appellee
310 South Main, Suite 1400
Salt Lake City, Utah 84101
Telephone: (801) 328-1162

GORDON A. MADSEN, #2048
ROBERT C. CUMMINGS, #777
Attorneys for Defendants/Appellants
225 South 200 East, #150
Salt Lake City, Utah 84111
Telephone: (801) 322-1141

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Defendants/Appellants.

BRIEF OF APPELLEE

Case No. 920846

Priority No. 16

Plaintiff/appellee, Dale H. Morgan, submits the following as his brief of appellee in the above-entitled action:

JURISDICTION

This court has jurisdiction in this appeal pursuant to Utah Code Annotated, §78-2-2(3)(j), and Rule 3a, Utah Rules of Appellate Procedure. Further, this appeal has properly been transferred to the Utah Court of Appeals by the Supreme Court of the State of Utah, in conformity with Rule 42 of the Utah Rules of Appellate Procedure.

NATURE OF THE PROCEEDINGS

This is an appeal from an order of the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable Richard H. Moffat, District Court Judge presiding, entitled "Summary Judgment and Order," signed and entered in the trial court on or about May 1, 1992.

DETERMINATIVE AUTHORITIES

There is no statutory nor case law authority believed by appellee to be wholly dispositive of the issues raised in this appeal.

STATEMENT OF FACTS

1. Plaintiff and defendant were formerly husband and wife, having been divorced in Salt Lake County, State of Utah, in 1979, in a separate action. Pursuant to the decree of divorce entered between these parties, various dispositions were made regarding, among other things, the parties' assets. The parties' assets included two parcels of real property, a residence in Salt Lake County (hereinafter "home") and in a summer home in Summit County (hereinafter "summer home.") In the decree of divorce, the parties were also ordered to pay various costs and expenses associated with these two properties, including mortgages and costs of maintenance.

2. Appellee/plaintiff, Dale H. Morgan, commenced this

action against Barbara A. Morgan, her mother, Eva S. Barney, and Valley Bank & Trust Company, by filing a complaint on November 6, 1986. Plaintiff alleged, among other things, that defendant, Barbara A. Morgan, had defrauded him into deeding to her his title interest in the two real properties. He claimed that he still held an equitable interest in the two properties. (R.O.A., 3, 4).

3. Plaintiff also alleged in his complaint that defendant, Eva S. Barney, acquired an interest in the home (but not in the summer home) by reason of a lien granted to her by her co-defendant, Barbara A. Morgan, which was recorded against the title of the home on May 27, 1986. (R.O.A., 4, 5).

4. Plaintiff filed this action to quiet title in his undivided one-half interest in the home and the summer home, which he had been granted in the decree of divorce. Defendant gave notice of this action to all interested parties through service of process by publication, as is appropriate in a quiet title action. (R.O.A., 11, 12, 13 and 14).

5. This action was ultimately consolidated with the divorce action. (R.O.A., 26, 27).

6. Defendants, filed a motion to dismiss plaintiff's complaint. This motion was denied below pursuant to an order of December 29, 1986. (R.O.A., 29).

7. It is critical to note that in her answer to plaintiff's complaint, paragraph 5, defendant, Barbara A. Morgan,

admitted that the plaintiff had granted to her a quit-claim deed to the summer home, and that this was recorded with the Summit County Recorder "in due season." (R.O.A., 35). Thus, as of the date of her answer, on or about January 15, 1987, defendant, Barbara A. Morgan held sole legal title to the summer home.

8. Defendants took no further action of any kind whatsoever to pursue this case during 1987 and the first four months of 1988, and the case was ordered dismissed, for failure to prosecute the action, on April 18, 1988. (R.O.A., 41). Defendants objected to that order of dismissal. (R.O.A., 42). The court allowed this objection, and granted defendant leave to file a counter-claim. (R.O.A., 49). She filed a counterclaim on August 19, 1988. (R.O.A., 50).

9. Plaintiff moved the court to dismiss the action for failure to prosecute on September 27, 1991, approximately three years after the filing of the defendant's counterclaim. (R.O.A., 59).

10. The court's response to this motion to dismiss for failure to prosecute was to set a scheduling conference on December 5, 1991. (R.O.A., 65). The case was set for trial for April 13, 1992, (R.O.A., 84).

11. On February 11, 1992, plaintiff submitted requests for admissions to the defendant. Specifically, plaintiff asked the defendant to admit that the attachments to the requests for admissions were the only verification defendant had of her

claimed entitlement to $49,000.00. These requests for admissions were properly served upon defendant's counsel by mailing on February 10, 1992. The thirty-day time limit in which the opportunity to respond to the requests for admissions expired on March 15, 1992. Thereafter, the requests for admissions were deemed admitted. Rule 36(b) of the Utah Rules of Civil Procedure.

12. In the meantime, Pine Meadow Ranch Owners' Association, (hereinafter the "homeowner's association") commenced a lawsuit against plaintiff, Dale H. Morgan, by filing a complaint in the "Fifth Circuit Court, Park City Department, in and for Summit County, State of Utah" on June 10, 1986, alleging that Dale H. Morgan was indebted to the homeowner's association in the sum of $4,246.47, for assessments on the summer home. (R.O.A., 157).

13. Dale H. Morgan answered that separate Circuit Court complaint of the homeowner's association. (R.O.A., 159).

14. On December 5, 1986, the homeowner's association filed an amended complaint, naming Barbara A. Morgan as a defendant in the Circuit Court lawsuit. (R.O.A., 178, 179). As noted above, Barbara A. Morgan, had received a quit-claim deed from Dale H. Morgan and had, by then, recorded it, making her the sole record title holder of the summer home.

15. Barbara A. Morgan was served with a summons in the Circuit Court action. A return of service upon her was duly filed with the court on December 22, 1986. (R.O.A., 180, 181).

16. Barbara A. Morgan failed to respond to the complaint, and default was entered against her by the Circuit Court on January 14, 1987. (R.O.A., 182).

17. The homeowner's association obtained a default judgment against Barbara A. Morgan, alone, on January 14, 1987. This judgment was in the sum of $4,975.27, together with interest from October 31, 1986, attorney's fees of $1,500.00, and court costs of $210.75. (R.O.A., 186, 187).

18. On June 5, 1987, Pine Meadow Ranch Owners' Association obtained a writ of execution from the Circuit Court to execute upon Barbara A. Morgan's real property. (R.O.A., 188, 189). The total judgment against Barbara A. Morgan which the homeowner's association sought to satisfy by the writ of execution was in the sum of $7,073.03.

19. On August 3, 1987, the Summit County Sheriff conducted a sale of the summer home. The homeowner's association purchased the property for the sum of $6,000.00, leaving a balance due on its judgment of $1,073.03. (R.O.A., 190, 191). A notice was filed with the Circuit Court that, as of August 3, 1987, the property was subject to a six month redemption. (R.O.A., 191).

20. On or about March 1, 1988, a Sheriff's deed from the Summit County Sheriff to the homeowner's association was recorded with the Summit County Recorder's Office. (R.O.A., 200, 201). It should be noted that this deed from the Sheriff to Pine Meadow Ranch Owners' Association was not recorded until the six month

redemption period had passed. Thereafter, on May 5, 1988, a special warranty deed from homeowner's association, to Dale H. Morgan was recorded with the Summit County Recorder's Office. The title to the summer home passed to Dale H. Morgan from the homeowner's association approximately seven and one-half months after the Sheriff's execution sale.

21. On March 9, 1992, plaintiff filed his motion for summary judgment and supporting memorandum in this action. (R.O.A., 130). Defendant filed a memorandum in opposition to plaintiff's motion on March 18, 1992. (R.O.A., 135). Plaintiff filed his reply memorandum on March 20, 1992.

22. The depositions of both parties were before the court at the time the trial court considered the plaintiff's motion for summary judgment. Specifically, the plaintiff's deposition had been taken by defendant's counsel on December 2, 1988. The defendant's deposition had been taken on November 30, 1989. (R.O.A., 239, 317).

23. After submission of the plaintiff's motion for summary judgment for decision on March 24, 1992, (R.O.A., 148) the defendant filed a "Supplemental Affidavit of Defendant, Barbara A. Morgan." This was filed on March 27, 1992, (R.O.A., 151).

24. In her affidavit to the court of March 27, 1992, defendant, Barbara A. Morgan, admits that there is a return of service in the Circuit Court lawsuit, indicating that she had been served with process in that Circuit Court action. (R.O.A.,

152). She states that she does not remember being served with the Circuit Court summons.

25. The court below issued a minute entry granting plaintiff's motion for summary judgment on April 7, 1992. (R.O.A., 204). Barbara A. Morgan filed objections to the plaintiff's proposed summary judgment and order on April 21, 1992, and plaintiff filed a response to those objections on April 28, 1992. (R.O.A., 213). Thereafter, on May 1, 1992, the trial court signed and entered the plaintiff's proposed summary judgment and order, thus overruling the defendant's objection to the proposed order. (R.O.A., 216).

SUMMARY OF ARGUMENTS

1. The summary judgment appealed from is a final judgment, and therefore, this appeal is not premature. However, if this court should find that the summary judgment is not a final order, and that this appeal is premature, then the entire appeal should be dismissed, without a decision on the merits, and the case should be remanded to the trial court for entry of a final judgment.

2. The parties to this action were not co-tenants of the summer home at the time the Circuit Court lawsuit was commenced. Therefore, the actions of plaintiff in buying the summer home cannot inure to the benefit of the defendant. The summer home

was not redeemed from the Sheriff's sale, and therefore, there is no redemption to inure to the benefit of these parties, even if the parties were co-tenants.

3. There are no facts before the trial court, nor before this court, to establish "collusion" between the plaintiff here and the homeowner's association. Because there is no factual dispute as to this issue, then there is no factual issue to be determined by the trial court.

4. The Circuit Court properly issued a judgment against defendant here, Barbara A. Morgan. The court issued a writ of execution, and the Summit County Sheriff conducted an execution sale upon the summer home on August 6, 1987. No one redeemed the property within six months after that execution sale, and the Summit County Sheriff issued a deed to the homeowner's association. The homeowner's association thereafter deeded the property to Dale H. Morgan, weeks after the six-month redemption period had passed. Barbara A. Morgan irrevocably lost any interest she had in the summer home as a result of the execution sale. These circumstances establish a basis to quiet title in the summer home in the plaintiff, as a matter of law.

5. Defendant's claims against the plaintiff under the decree of divorce for arrearages in mortgage payments, real property taxes, real property insurance, the costs of maintenance and repair to the residence, and child support arrearages, allegedly totalling $49,590.00, were clearly subject to dismissal

pursuant to the plaintiff's motion for summary judgment. The lower court had before it the defendant's deposition in which she was unable to establish or document any of the alleged claims totalling $49,590.00. Defendant failed to answer, the requests for admissions, in which she admitted that she had no further verification of her claimed expenses, except those few attached to the requests for admissions. These requests for admissions were deemed admitted as a matter of law. Most importantly, the defendant, Barbara A. Morgan, filed absolutely no affidavit in support of her claim for $49,590.00, and in opposition to the motion for summary judgment until the time to do so had passed. The court was entitled to enter the summary judgment against the defendant, as a matter of law, for the following reasons:

a. The defendant's repeated failure to pursue her counterclaim, through the court's own dismissal order and the plaintiff's motion to dismiss, over a period of over five years; and

b. The defendant's own deposition testimony to the effect that she was unable to document any of her expenses claimed; and

c. The defendant's failure to respond timely with an affidavit or other sworn statement in opposition to the motion for summary judgment; and

d. The defendant's admissions, pursuant to the plaintiff's requests for admissions; and

e. The fact that the plaintiff, in his summary judgment motion, relinquished any claim he had against the home in Salt Lake County, the only property remaining as the subject of the litigation below, in which he claimed one-half interest.

ARGUMENT

1. THE SUMMARY JUDGMENT APPEALED FROM IS A FINAL JUDGMENT, AND THIS APPEAL IS NOT PREMATURE.

Appellant alleges in her brief that the summary judgment appealed from is not a final order, and is not properly the subject of this appeal.

As set forth in paragraph 25, above, the lower court first received defendant's objection to the proposed order on the motion for summary judgment, then received plaintiff's response to that objection, and then issued the order, which is the subject of this appeal. Clearly, this action on the part of the trial court constitutes a denial of the defendant's objection to the proposed order. Therefore, this appeal is from a final order.

If this court should determine that the appeal is not from a final order, then the appellant's entire appeal is improper. The appeal should then be dismissed, as untimely, and the matter should be remanded to the District Court for entry of a final judgment, without any determination on the merits of this case.

If this appeal is dismissed, then plaintiff should be awarded his attorney's fees incurred in pursuing this appeal, which defendant filed, knowing it to be premature and not from a final judgment.

2. APPELLANT INCORRECTLY APPLIES THE DOCTRINE OF COTENANCY TO THE FACTS OF THIS CASE.

In point 2 of her argument, defendant, Barbara A. Morgan, relies heavily upon the doctrine of cotenancy to assert that the trial court erred, as a matter of law, in finding that defendant could no longer assert a claim on the summer home. Defendant misapplies the law of the state of Utah with regard to this doctrine, to the facts of the instant case.

Defendant cites the case of McCready v. Fredericksen, 126 P. 316 (1912), in support of her claim. The McCready case has no application to the facts in the instant case. McCready deals with the question of whether or not a cotenant can make a claim to quiet title against a cotenant, based upon the doctrine of adverse possession. The Utah Supreme Court, in the McCready decision, upheld the proposition that the action of one tenant to preserve an interest in real property would be deemed the action of all cotenants in the property.

Defendant also cites, in favor of her position on appeal, the case of Sweeney Land Company v. Kimball, 786 P.2d, 760 (Ut. 1990). Again, the Sweeney case deals with the issue of whether

or not one cotenant to real property can assert a claim for adverse possession of the property against another cotenant. Again, in Sweeney, the Utah Supreme Court upheld the proposition that an action of one tenant to preserve property would inure to the benefit of all cotenants.

This case law cited by defendant has no application to the instant lawsuit whatsoever. In this case, no one has ever made a claim against any other party for adverse possession, which is the underlying legal theory addressed in both McCready and Sweeney. In the case at bar, plaintiff originally filed his complaint alleging defendant had obtained the legal title to two parcels of real property by fraud. He alleged defendant and plaintiff had each been awarded a one-half interest in their real property in their divorce, and that defendant subsequently misrepresented to plaintiff that she had a buyer for the property. She induced plaintiff to give her a quit-claim deed to both properties in order to enable her to close the sales. There was no buyer, but defendant nonetheless recorded the quit-claim deeds to the property, thus placing all legal title in both parcels in her own name. Plaintiff commenced this action to establish that the quit-claim deeds had been obtained on the basis of fraud, and that he still held an interest in the home and the summer home which had been awarded to him in the decree of divorce. He was forced to commence that action as a quiet title action, because of the interests of other parties,

including a first lien mortgage holder, the defendant's mother as a second lien mortgage holder, the homeowner's association, etc. Plaintiff has never claimed that he was entitled to the summer home or to the home by reason of the doctrine of adverse possession.

Subsequently, the homeowner's association brought suit regarding homeowner's fees due for the summer home. Despite the fact that defendant, Barbara A. Morgan, held all record title to the summer home, the homeowner's association nonetheless sued the wrong person. The homeowner's association sued the plaintiff here, Mr. Morgan, who no longer held any record title interest in the property due to the conduct of the defendant.

The homeowner's association obviously recognized its error when it amended its Circuit Court complaint to include Barbara A. Morgan as a defendant in that lawsuit. According to the Circuit Court records, defendant, Barbara A. Morgan, was served as a defendant in the Circuit Court action, and her default was entered, as set forth in the Statement of Facts, above. The homeowner's association then proceeded to execute upon the summer home, the legal title to which was held solely and exclusively in the name of Barbara A. Morgan. She failed to defend the lawsuit against her, she failed to take any action to defend the property which was then solely and exclusively in her name, and after the property was lost in the execution sale, she failed to redeem the property for a period in excess of six months.

Plaintiff, Mr. Morgan, acquired his new interest in the summer home by purchasing it from the homeowner's association after all right, title and interest of Barbara A. Morgan in that property had been extinguished as a matter of law.

The parties to this action were simply not cotenants of the summer home under any stretch of the imagination. Barbara A. Morgan held sole and exclusive title to that real estate when the homeowner's association sued for its fees. Barbara A. Morgan, through her own inaction, lost all title to the property to the homeowner's association. Because the homeowner's association obtained proper legal title to the summer home, during the pendency of the action between these parties in the District Court, any claim of these tow parties to the summer home addressed in this District Court lawsuit, was extinguished.

Therefore, as a matter of law, these two litigants were not cotenants of the property in issue at any time relevant to these proceedings. Defendant lost the title to the property due to her failure to answer a lawsuit, to pay a judgment, or to redeem the property after the execution sale.

Plaintiff, Mr. Morgan who purchased this property independently from the homeowner's association long after the execution sale, should be treated here as would any independent third-party purchaser of the property. He acquired all the interest of the homeowner's association by his independent purchase, free of any claim on the part of the defendant. The

plaintiff's subsequent purchase of the property long after the fact did not somehow suddenly regenerate a cotenancy in the property which had been extinguished years before by the defendant's filing of a quit-claim deed she had received, allegedly by fraud, from the plaintiff.

Defendant incorrectly asserts that the rights of these parties in the summer home arise out of their prior marital relationship. This may have been true at one time. However, the chain of events with regard to this property after that marital relationship was severed have thoroughly erased any right the defendant may have to the summer home by reason of the marital relationship. This chain of events includes the decree of divorce, the subsequent quit-claim deed of the summer home by plaintiff here to defendant, Barbara A. Morgan, the subsequent lawsuit against Barbara A. Morgan by the homeowner's association, the judgment obtained by the homeowner's association against Barbara A. Morgan, which attached as a lien to the property, the execution sale of the property, the failure to redeem after the execution sale, and the subsequent purchase for new consideration by Dale H. Morgan. The marital relationship of these parties is so remote in time and so remote in this chain of events, that it gives no basis to the defendant to claim an equitable interest in the plaintiff's summer home.

3. THERE IS NO FACTUAL ISSUE AS TO WHETHER PLAINTIFF AND THE HOMEOWNER'S ASSOCIATION WERE "IN COLLUSION."

The defendant attempts to raise a red herring, alleging that plaintiff and the homeowner's association were somehow in collusion, and that as a result of such alleged collusion, plaintiff should be deemed to hold the summer home in a fiduciary capacity for the benefit of both parties to this action.

In the defendant's point 3 of her brief, she raises a number of objections to the proceedings in the Circuit Court. She alleges a number of procedural irregularities in the Circuit Court. It should be noted that defendant has never made any effort whatsoever in that case since she was served with process in the Circuit Court action on November 14, 1986. In other words, during a period of approximately six years and two months, defendant has never answered that complaint against her, nor moved the court for relief from the default judgment against her, nor objected to the personal or subject matter jurisdiction of the Circuit Court, nor moved the court to stay the execution sale, nor filed bankruptcy to stay the execution sale, nor attempted to redeem the property from the execution sale. Though defendant herein has known about the Circuit Court action and judgment since at least early 1992, when her own attorney in this case began to make reference to that judgment and action, she still has failed to take any independent action objecting to the

Circuit Court proceedings.

This appeal is not the proper forum to object to the Circuit Court matter. The Circuit Court itself, and then the appropriate appellate court, would be the proper forum in which to address any alleged any procedural irregularities in the Circuit Court case. The defendant cannot collaterally attack the Circuit Court order here. On the face of that court file, the defendant was properly sued, properly served, properly defaulted and properly executed upon. If she wishes to attack those proceedings, she must do so in the Circuit Court in order to give the Circuit Court an opportunity to correct its own error, and an order to give a very interested party, the homeowner's association, an opportunity to respond to those attacks.

All of the defendant's "indications of collusion" cited in point 3 of her appeal brief, seem to be predicated on one underlying assumption: that the plaintiff here, Dale H. Morgan, had a duty to answer and defend the lawsuit from the homeowner's association, to protect the interests of Barbara A. Morgan, but that Barbara A. Morgan had no similar duty to answer the lawsuit when she was served, nor to defend that lawsuit to protect herself. Simply put, defendant claims that plaintiff here is somehow at fault for eventually giving up on that lawsuit and failing to incur the expenses to defend it, while defendant here is not similarly at fault. Neither party to this action had any legal duty to the other party to defend a lawsuit, when both

parties had notice of that lawsuit, and an opportunity to appear and defend.

Defendant alleges that it is a "indication of collusion" that she was supposedly told by Dale H. Morgan that the Circuit Court lawsuit was "groundless." Defendant seems to argue in her brief that plaintiff had some fiduciary obligation to put her on notice that his interests were adverse to her own. Such a claim is ludicrous. Plaintiff and defendant had sued each other and been divorced from each other in 1979. Plaintiff had subsequently filed the lawsuit which is the subject of this appeal, claiming, among other things, that defendant had committed fraud with regard to the titles to the real property. It is absurd to suggest, under this set of facts, that defendant still believed, when served with the homeowner's association lawsuit, that Dale H. Morgan was acting in her best interests, or taking care of her property rights. Plaintiff owed no fiduciary obligation to the defendant under the circumstances, and defendant had an obligation to protect her own property.

Defendant seems to allege that there was some procedural irregularity about the fact that no judgment was ever entered against Dale H. Morgan in the Circuit Court proceeding. The answer to this mystery is simple. Mr Morgan never permitted himself to be defaulted. Further, defendant forgets her own position asserted in the trial court below, that Dale H. Morgan had previously deeded to her all interest in the summer home, and

that she had recorded the deed, thus granting her sole legal title to the property. If she was the sole legal titleholder of the summer home, then she was the only person against whom the homeowner's association needed to proceed to get what they wanted - - payment of their fees or possession of the home located within their homeowner's association. Arguably, plaintiff here and defendant, Barbara A. Morgan, were jointly and severally liable for any homeowner's association fees incurred while they were joint owners of the summer home. Thereafter, Barbara A. Morgan became solely obligated for any expenses incurred in connection with the summer home she claims she owned. Defendant here defaulted in that lawsuit, and the homeowner's association properly obtained its judgment against her. Thereafter, the homeowner's association executed upon the property which was held solely and exclusively at that point in time by Barbara A. Morgan. Therefore, the homeowner's association did not need to waste time or expenses pursuing Dale H. Morgan further, nor did the homeowner's association need to obtain a judgment against him to get what it wanted. Further, the homeowner's association took the interest of Barbara A. Morgan only, in the summer home. The property was still subject to Mr. Morgan's lis pendens arising out of this lawsuit, so he was protected. There is nothing peculiar about the actions of either the homeowner's association or the Dale H. Morgan in this scenario. In fact, the homeowner's association did exactly what one would expect such a creditor to

do under such circumstances.

Defendant asserts, without any evidence on the record to support her assertion, that the summer home had a value of $165,000.00. There is no basis in the record for such a claim, and there was no evidence before the trial court, nor is there any evidence before this court, of the true valuation of that property.

Defendant can establish no evidence for the alleged "laundering procedure" between plaintiff here and the homeowner's association, other than her misguided analysis of the Circuit Court lawsuit. There is simply no factual basis to suppose any collusion between plaintiff, Mr. Morgan, and the homeowner's association.

Assuming for the sake of argument that Mr. Morgan and the homeowner's association did in fact collude to "launder" the title to the summer home, and simultaneously to pay the fees owing to the homeowner's association, then defendant cannot describe one reason why such action on the part of the plaintiff was illegal or improper. As noted above, plaintiff here owed no fiduciary obligation to the defendant at any time relevant to these proceedings. Defendant was an adult represented by legal counsel, who knew full well that the plaintiff's interests were seriously adverse to her own because she had been sued by him in an action seeking to obtain title to real estate she held solely in her own name. If this court assumes, for the sake of

argument, that Mr. Morgan and the homeowner's association did in fact collude, there is no reason why such collusion cannot result in the title to the property lawfully being held by plaintiff, and the defendant losing all right to claim an interest in that property.

4. BECAUSE OF THE EXECUTION SALE OF THE SUMMER HOME, THE TRIAL COURT BELOW PROPERLY FOUND THAT PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD BE GRANTED, AND THAT PLAINTIFF IS ENTITLED TO THE SOLE AND EXCLUSIVE LEGAL TITLE TO THE SUMMER HOME.

As noted above, plaintiff purchased the summer home from the homeowner's association over seven months after the execution sale. He never owed any fiduciary obligation to the defendant. The execution sale and subsequent purchase of the summer home by plaintiff severed any claim defendant had to the summer home as a matter of law. Therefore, the trial court acted properly in granting summary judgment to the plaintiff, and awarding him sole legal title interest in that property.

Again, in point 4 of her brief, defendant alleges that there is an issue of collusion between the homeowner's association and plaintiff in the Circuit Court action. As noted above, there is no basis to suppose collusion from the facts of this case. Even if collusion is assumed, this is not a reason to grant defendant any legal or equitable interest in the summer home.

Also, in point 4 of her brief, the defendant attacks alleged procedural irregularities in the Circuit Court proceeding. As noted above, this appeal is not the proper forum for that attack. Defendant should attack the Circuit Court action in the Circuit Court itself, and if unsuccessful there, should appeal from that decision. This case is not the proper forum to attack the Circuit Court decision, when the homeowner's association is not a party to this action to defend itself, and when the defendant has acquiesced to the Circuit Court proceedings by defaulting, and by failing to petition the court to set aside her default.

5. DEFENDANT'S CLAIM FOR ARREARAGES IN MORTGAGE PAYMENTS, BACK TAXES, REAL PROPERTY INSURANCE, REPAIRS TO THE RESIDENCE AND CHILD SUPPORT ARREARAGES WERE PROPERLY DISMISSED BY THE TRIAL COURT PURSUANT TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT.

Defendant asserts a counterclaim against plaintiff for approximately $49,590.00. Defendant alleges in her counterclaim that plaintiff owes her this money under the decree of divorce entered between these parties for trust deed payments she made to Valley Bank, arrearages on real property taxes for both the summer home and the home, arrears for insurance, for repairs which defendant paid, and arrearages in child support.

The court granted plaintiff's motion for summary judgment to dismiss this counterclaim. This action on the part of the trial

court is proper.

A. DEFENDANT RAISED NO FACTUAL BASIS TO OBJECT TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT.

As noted in the statement of facts, set forth above, plaintiff filed his summary judgment motion below on March 9, 1992. Defendant responded by a memorandum in opposition on March 18, 1992. Plaintiff filed a reply memorandum on March 20, 1992. At this point in time, the opportunity for the parties to file affidavits in support of or in opposition to the summary judgment motion ended. At this point in time, the opportunity for the parties to file memoranda in support of their respective positions also terminated. Defendant did not file any affidavit in opposition to the plaintiff's motion for summary judgment until her "supplemental affidavit" filed March 27, 1992. (R.O.A., 151). This filing occurred only after the court had indicated it had taken the matter under advisement and would rule on the motion. (See minute entry of March 26, 1992, R.O.A., 150).

The defendant simply failed to file any timely affidavit in opposition to plaintiff's motion for summary judgment until long after the time period for her to do so had elapsed. Therefore, the trial court did not commit any error in granting the plaintiff's motion for summary judgment.

B. THE TRIAL COURT HAD BEFORE IT A FACTUAL BASIS FOR GRANTING THE MOTION FOR SUMMARY JUDGMENT.

At the time the trial court granted the plaintiff's motion for summary judgment, the trial court had before it the deposition of the plaintiff, the deposition of the defendant, and the plaintiff's request for admissions which were deemed admitted by the defendant as a matter of law. Pursuant to the testimony of the plaintiff in his deposition, the defendant in her depositions and the defendant's inability to deny or refute any of the contents of the requests for admissions, it is clear that the undisputed facts before the court were to the effect that the defendant's counterclaim should be denied. The court did not err, on the record, in granting the plaintiff's motion for summary judgment.

C. THE FACT THAT A CLAIM FOR CHILD SUPPORT IS INVOLVED DOES NOT CHANGE THE PROPRIETY OF THE TRIAL COURT'S RULING.

Defendant seems to assert, at page 34 of her brief, that it is not proper to set off a claim for a money judgment or property rights against a claim for child support. This allegation on the part of the defendant is wholly without authority. It is apparently defendant's position that if plaintiff and defendant owe each other money, the court cannot set-off these claims, one against the other, if one claim is for child support and the

other is for a property settlement. This is simply not the status of the law, and defendant can cite no authority for this proposition.

6. THERE IS AN INDEPENDENT BASIS FOR THE TRIAL COURT'S RULING.

Defendant's argument wholly ignores an independent basis for the trial court's determination to grant plaintiff's motion for summary judgment.

This lawsuit was commenced on November 6, 1986. Defendant did the bare minimum required to avoid being defaulted upon that complaint, by filing a motion to dismiss, and when that motion was denied, by filing an answer. As noted in the Statement of Facts above, the case then sat for a period of fourteen months from the date of her answer on January 15, 1987, until the court's own order to show cause why the case should not be dismissed for failure to prosecute the action, which was filed March 30, 1988. (R.O.A., 40). The court actually dismissed the case, and the case lay dormant and dismissed from the April 15, 1988 order of dismissal (R.O.A., 41), until the defendant filed a "Motion to Rescind Order of Dismissal" approximately three months later on July 5, 1988. (R.O.A., 42).

The trial court indulged the defendant by granting her motion to rescind the dismissal, and granting her leave to file her counterclaim, which she did in fact file on August 19, 1988.

(R.O.A., 50). Plaintiff responded to that counterclaim, and there was a brief flurry of activity from defendant while the plaintiff was deposed on November 2, 1988.

This lawsuit lay dormant again, including the defendant's counterclaim against the plaintiff, from the date of the defendant's deposition on November 30, 1989, until plaintiff filed a motion to dismiss for failure to prosecute almost two years later on September 27, 1991. Defendant did not timely respond by objecting to this motion, and on October 11, 1991, plaintiff submitted this motion to the court pursuant to a notice to submit and request for ruling. (R.O.A., 62). Only after the motion had been pending for over one month did the defendant file a certification of readiness for trial on October 16, 1991. (R.O.A., 64). When defendant filed her certification of readiness for trial, she had not complied with discovery requests which had been made to her in the course of her deposition on November 30, 1989. (See plaintiff's objection to certification of readiness for trial, R.O.A., 70; see also plaintiff's motion to compel discovery filed October 30, 1991, R.O.A., 76).

The plaintiff then filed his motion for summary judgment. The motion for summary judgment was, in effect, merely a reiteration of his motion to dismiss the case for failure of the defendant to prosecute her counterclaim. In his motion for summary judgment, the plaintiff asked the court to dismiss his claim against the defendant, to dismiss the defendant's claim

against the plaintiff, to leave the legal titles to two properties as reflected by the County Recorder's Offices, and to leave each party to assume his or her own court costs and attorney's fees. Plaintiff asked for nothing in his motion for summary judgment which would not also be the result of the court granting plaintiff's motion to dismiss for failure to prosecute.

The trial court never ruled specifically upon the plaintiff's motion to dismiss for failure to prosecute, but instead granted the plaintiff's motion for summary judgment.

Given the defendant's dilatory pursuit of her counterclaim for a period spanning five years, the trial court was well within its rights to dismiss the parties' causes of action for failure to prosecute, and the trial court accomplished exactly this by granting the plaintiff's motion for summary judgment.

An independent legal basis to support the court's ruling in this matter exists on the record, and even if the court should not have granted a motion for summary judgment under the facts and circumstances of this case, the court was operating well within its rights to control its calendar and to dismiss stale litigation for failure of the parties to prosecute their actions. For this independent reason, the judgment and order of the trial court should be affirmed, as harmless error.

(The court should also consider the defendant's actions in the case now before the court, when assessing her claim that she was not really served with the Circuit Court lawsuit, and that

her failure to take any action in the Circuit Court lawsuit was caused solely by her lack of notice of that proceeding. Her conduct in this litigation indicates otherwise.)

7. THE COURT MUST CONSIDER THE TRIAL COURT ORDER OF SUMMARY JUDGMENT AS AN ORDER CONSISTING OF MULTIPLE PARTS.

The summary judgment and order entered by the trial court on or about May 1, 1992, is an order which actually consists of multiple parts. This court can and should consider each part of that summary judgment separately. Even if this court determines to reverse the trial court as to some portion of the summary judgment and order, this court can and should still affirm portions of the summary judgment and order.

Paragraph 3, of the summary judgment and order contains an order that each party shall continue as the sole legal title holder of the property he or she has ended up with as of the date of the summary judgment. In other words, plaintiff is to continue as the sole legal title holder to the summer home, by reason of his purchase of the summer home from the homeowner's association. The defendant is to continue as the sole legal title holder of the home, pursuant to the quit-claim deed she received from the plaintiff and had previously recorded.

There is no basis for the defendant to object legally to the plaintiff's ownership of the summer home at this time, given the

status of title of that home. The trial court did not err in finding that the plaintiff holds sole and exclusive title to that property free and clear of any interests of the defendant, as a matter of law. This portion of paragraph 3 of the summary judgment and order should stand.

Therefore, if this court should determine that the court below lacked adequate basis to dismiss plaintiff's claim against defendant regarding the home, and defendant's counterclaim against the plaintiff based upon the decree of divorce, then this court should reverse and remand to the trial court for trial on the plaintiff's claim regarding the home, and the defendant's counterclaim. Even if the court does reverse the trial court's decision in part, in this manner, the trial court's decision regarding the title to the summer home should be affirmed.

CONCLUSION

The trial court properly found, from the evidence in the record, that the plaintiff's motion for summary judgment should be granted with regard to the title of the summer home. The plaintiff is the legal titleholder of that home, as a matter of law.

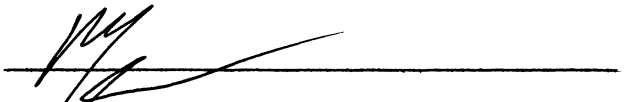
The trial court did not err in granting the plaintiff's motion for summary judgment dismissing plaintiff's claim and defendant's counterclaim. Summary judgment on those issues was proper as well.

The order of the trial court should be affirmed in its entirety.

In the alternative, that portion of paragraph 3 of the summary judgment and order finding that the plaintiff is the sole legal titleholder of the summer home should be affirmed, and the remaining portions of the summary judgment and order should be reversed and remanded for trial.

RESPECTFULLY SUBMITTED this 29th day of January, 1993.

CORPORON & WILLIAMS



MARY C. CORPORON
Attorney for Plaintiff/Appellee

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I am employed in the offices of Corporon & Williams, attorneys for the plaintiff/appellee herein, and that I caused the foregoing BRIEF OF APPELLEE to be served upon defendant/appellant by placing 2 true and correct copies of the same in an envelope addressed to:

GORDON A. MADSEN
ROBERT C. CUMMINGS
Attorneys for Defendant/Appellant
225 South 200 East, #150
Salt Lake City, Utah 84111

and depositing the same, sealed, with first-class postage pre-paid thereon, in the United States mail at Salt Lake City, Utah on the 29th day of January, 1993.

CORPORON & WILLIAMS

MARY C. CORPORON
Attorney for Plaintiff/Appellee